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No. 89-333

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPENING BRIEF

JOHN K. VAN DE KAMP
Attorney General for the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON*
Deputy Attorney General
CLIFFORD T. LEE
Deputy Attorney General
350 McAllister Street, Suite 6000
San Francisco, CA 94102
(415) 557-3920, 557-7027

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 974-2300

60 pp

QUESTION PRESENTED

Whether the Federal Power Act preempts state regulatory water rights laws otherwise applicable to hydropower projects licensed by the Federal Energy Regulatory Commission, or instead whether section 27 of the Act—which subjects such projects to state laws relating to the "control, appropriation, use, or distribution" of water—precludes such preemption.

PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.

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PETITIONER'S OPENING BRIEF

OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1-13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. 14-22, 23-36) are reported at 38 FERC ¶ 61,240 (March 1987) and 41 FERC ¶ 61,198 (November 1987).

JURISDICTION

The decision of the Court of Appeals was entered on June 6, 1989. No petition for rehearing was filed. The petition for writ of certiorari was filed on August 26, 1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 27 of the Federal Power Act provides:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Limited Partnership ("partnership") operates a hydropower project on Rock Creek, a tributary of the South Fork of the American River located near Placerville, California. Decision 1596, State Water Resources Control Board (hereinafter "D 1596"), at 2 (J.A. 52). The main feature of the project is a dam located approximately one mile above Rock Creek's confluence with the American River. *Id.* The dam diverts water through a tunnel and penstocks to a powerhouse containing three turbine generators with a capacity of 3,000 kilowatts. *Id.* (J.A. 52- 53). The water is returned to the American River about one mile below the original diversion point. *Id.* The project has the capacity

to generate about 7,000 megawatt-hours of electrical power annually. *Id.* The project is located partially on private lands owned in fee by the partnership and partially on public lands administered by the U.S. Bureau of Land Management. Water Rights Order 87-2, at 11 (J.A. 83).

On June 1, 1982, the partnership's predecessor in interest, Joseph M. Keating, applied to the Federal Energy Regulatory Commission (FERC) for a license to build and operate the Rock Creek project. Order Issuing License, Federal Energy Regulatory Comm'n (hereinafter "License Order"), at 1 (J.A. 13). FERC issued the license on April 29, 1983. *Id.* The license requires the project to maintain minimum flows—that is, to allow certain quantities of water to bypass the dam for the protection of downstream fish resources—of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April. *Id.* at 2 (J.A. 15-16). FERC adopted the flow rates recommended by Keating on the basis of his preliminary instream study, and rejected the higher flow rates recommended by the California Department of Fish and Game (CDFG). *Id.* FERC directed Keating to prepare a complete instream study and reserved jurisdiction to modify the flow rates after the study was completed. *Id.*

On March 22, 1980, Keating applied to the State Water Resources Control Board ("State Board") for permits to appropriate water for the project, and on June 4, 1982 filed an amended application. Staff Analysis, Rock Creek Hydroelectric Project, at 2 (J.A. 72). After lengthy hearings, the State Board on February 16, 1984, issued a water rights decision approving issuance of the permits. D 1596, at 1 (J.A. 51). The State Board adopted on an interim basis Keating's recommended flow rates, but found that his instream study was "deficient" because it failed to consider most habitat types and stream areas affected by the project. *Id.* at 8-9 (J.A. 59-60). Accordingly, the State Board required Keating, in consultation with CDFG, to prepare a new instream study before commencing construction or diverting water. *Id.* at 9 (J.A. 60). The State Board found that "Rock Creek is important because it provides fishery recruitment to the South Fork American River and because it directly provides adult trout for angler

harvest." *Id.* at 8 (J.A. 58). The State Board reserved jurisdiction to establish permanent flow rates after the instream study was completed. *Id.* at 15 (J.A. 66).[1]

After completion of the instream study, the State Board conducted a hearing to establish permanent flow rates for the project, which Keating in the meantime had sold to the partnership. After the hearing was concluded, the State Board on March 19, 1987, adopted permanent flow rates of 60 cfs from March through June and 30 cfs from July through February. Water Rights Order 87-2, at 48 (J.A. 124). These flow rates were consistent with the rates recommended by CDFG, and were substantially higher than the rates recommended by the partnership and contained in the FERC license. *Id.* The State Board found that the partnership's recommended rates "would greatly reduce the fishery habitat in Rock Creek" and that CDFG's recommended rates "would better protect the adult, juvenile and spawning habitats." *Id.* at 42, 43 (J.A. 118, 119).

2. Proceedings Below

On July 9, 1986, during the pendency of the State Board hearing to establish permanent flow rates, the partnership petitioned FERC for an order declaring that FERC has exclusive jurisdiction to establish flow rates and that the project need not comply with flow rates mandated by the State Board. Order in Response to Request for Declaratory Order (hereinafter "Declar-

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[1] The State Board granted the permits notwithstanding the "deficiency" of Keating's preliminary instream study so that Keating would not have to submit new applications after the final study was completed. Water Rights Order 87-2, at 19 (J.A. 91). The State Board believed that the issuance of the permits based on the preliminary study was appropriate because the permits specifically required Keating to obtain permanent flow requirements prior to diverting water. D 1596, at 9 (J.A. 60).

In determining whether unappropriated water was available for the project, the State Board determined that the partnership's appropriation rights are lower in priority than, and therefore are subject to, future upstream appropriations for domestic and stockwatering uses. D 1596, at 7, 13 (J.A. 58, 65).

atory Order"), at 3 (Pet. App. 16). On March 11, 1987, shortly before the State Board issued its decision, FERC issued a declaratory order stating that "the establishment of minimum flows is a matter beyond the reach of state regulation;" that the State Board "has no authority to set minimum flows for the project that conflict with those contained in the license;" and that the project "must comply with the flow requirements" of the license "irrespective of any action taken by" the State Board. *Id.* at 4-5 (Pet. App. 17-18).

On April 10, 1987, the State of California filed a motion to intervene in the FERC proceeding and a petition for rehearing. Order Denying Rehearing, at 1-2 (Pet. App. 24). In its rehearing request, California argued that section 27 of the Federal Power Act authorizes the State Board to establish minimum flow rates for the project. *Id.* at 3 (Pet. App. 25-26). FERC granted the intervention motion but denied the rehearing request, reaffirming its view that FERC has exclusive jurisdiction to establish flow rates. *Id.* at 2-3 (Pet. App. 24-25). Under 16 U.S.C. § 825l, California filed a petition in the Court of Appeals for review of FERC's declaratory order and order denying rehearing. Pet. App. 4.

On June 6, 1989, the Ninth Circuit affirmed FERC's declaratory order and order denying rehearing. Pet. App. 1-13. The court held that the Federal Power Act preempts state regulation of hydropower projects, and therefore that FERC has exclusive jurisdiction to establish flow rates for the Rock Creek project and that the State Board lacks jurisdiction to establish such rates. *Id.* The court rejected California's argument that section 27 of the Federal Power Act authorizes state regulation of hydropower projects, holding that section 27 merely protects private "proprietary rights" in water. *Id.* at 11. California filed a petition for writ of certiorari, which was granted on December 4, 1989.

SUMMARY OF ARGUMENT

I

Section 27 of the Federal Power Act (FPA) provides that hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) must comply with state laws relating to

"control, appropriation, use, or distribution" of water. On its face, the provision requires hydropower projects to acquire water rights under state law and to comply with conditions attached to such rights. In effect, the provision authorizes the states to exercise concurrent jurisdiction over federally-licensed hydropower projects. California's flow requirements in this case relate to "control, appropriation, use, or distribution" of water and thus fall within the scope of section 27.

Section 27 was modeled after section 8 of the Reclamation Act of 1902, which provides that federal reclamation projects must comply with state laws relating to "control, appropriation, use, or distribution" of water. In *California v. United States,* 438 U.S. 645 (1978), this Court held that section 8 requires federal reclamation projects to acquire water rights under state law and to comply with conditions attached to such rights. Since section 27 was modeled after section 8, section 27 imposes the same obligations on private hydropower projects. If Congress intends that state water laws apply to *federal* reclamation projects authorized and funded by Congress that serve important national purposes, *a fortiori,* Congress intends that state water laws apply to *private* hydropower projects operated for profit that serve essentially local purposes. In *California*, this Court held that section 8 does not authorize the application of state laws that conflict with "clear congressional directives." California's flow requirements in this case do not conflict with "clear congressional directives" and thus are valid under section 27.

II

Congress' traditional deference to state water rights laws supports the conclusion that Congress deferred to state law in enacting section 27. The policy of deference to state law originated in the equal footing doctrine, and has been carried forth in congressional statutes that "sever" water from public lands belonging to the federal government. As a result of the policy of deference, water rights in our federal system are controlled and regulated by the states, not the federal government. Accordingly, the states have total control of their internal waters, subject to federal constitutional limitations not applicable here, It is unlikely that Congress intended to abruptly change its tradi-

tional policy in enacting the FPA. Section 27 indicates that no such change was intended.

III

The legislative history of the FPA indicates that Congress intended to require federally-licensed hydropower projects to fully comply with state water laws. Indeed, the legislative history indicates that section 27 of the FPA was modeled after section 8 of the 1902 Reclamation Act, which, as this Court held in *California v. United States,* requires federal reclamation projects to comply with state water laws. According to the legislative history, Congress—believing that the states "owned" the water and the federal government owned the public lands—intended to create a federal program that would make public lands available for hydropower development without diminishing state water rights authority.

IV

In *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n,* 328 U.S. 152 (1946), this Court stated in dictum that section 27 is limited to "proprietary rights" in water and does not authorize state regulation of hydropower water uses. In *California v. United States,* this Court specifically rejected the argument that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," holding that section 8 authorizes state regulation of federal water uses. Since section 27 was modeled after section 8, the *First Iowa* dictum that section 27 is limited to "proprietary rights" is invalid after *California.* Indeed, the *First Iowa* dictum was specifically based on the premise that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," and *California* flatly rejected this premise. Additionally, the *First Iowa* dictum is inconsistent with the legislative history of the FPA, which indicates that Congress specifically intended to require hydropower projects to comply with state water laws.

The actual holding in *First Iowa* is distinguishable here because *First Iowa* held only that section 9(b) of the FPA does not require hydropower projects to acquire state permits as a "condition precedent" to acquiring FERC licenses. 328 U.S. at 170, 175.

This holding is inapposite here because the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. The question here is whether section 27 requires hydropower projects independently to comply with state water laws irrespective of any rights and obligations under a FERC license, a question that was not raised or definitively resolved in *First Iowa.*

V

FERC's assertion of exclusive jurisdiction over hydropower projects would result in potentially inconsistent regulation of water rights in the same river and create confusion in the administration and coordination of water rights. Under FERC's argument, state water laws would apply to all water users in a particular river—including, after *California,* the United States itself—except for private hydropower projects. Because of the interdependency of water rights, the states cannot effectively administer and coordinate water rights unless state laws apply to all users, including hydropower projects. In enacting section 27, Congress recognized that the states have legitimate interests in balancing hydropower needs against other needs dependent on the states' limited water supplies.

VI

There is no conflict between state and federal regulation of the Rock Creek project here. California has granted rather than denied a water right permit for the project. Moreover, California has adopted more stringent flow requirements than FERC; hence, the project, in complying with California's requirements, will necessarily comply with FERC's requirements as well. California's flow requirements do not frustrate the purpose of the FERC requirements, but instead provide more protection of the fish resources that are the subject of the FERC requirements.

ARGUMENT

I. SECTION 27 OF THE FEDERAL POWER ACT—CONSTRUED FACIALLY AND IN LIGHT OF THIS COURT'S DECISION IN *CALIFORNIA V. UNITED STATES*—PROVIDES THAT STATE WATER LAWS APPLY TO HYDROPOWER PROJECTS[2]

A. Facial Construction of Section 27

In 1920, Congress passed the Federal Water Power Act, 41 Stat. 1063 (1920), which was subsequently incorporated in the Federal Power Act of 1935 (FPA), 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r. The FPA created a federal agency—the Federal Power Commission, subsequently renamed the Federal Energy Regulatory Commission (FERC)—to regulate hydropower development. Section 1, 16 U.S.C. § 792. Under section 4(e), FERC is authorized to license the construction and operation of individual hydropower projects. 16 U.S.C. § 797(e). Under section 10(a), FERC must ensure that the licenses are consistent with a comprehensive plan for water development. 16 U.S.C. § 803(a).[3]

[2] The preemption issue raised here has its greatest impact in the three Pacific Coast states of California, Washington and Oregon because approximately one-half of the nation's total hydropower capacity exists in those three states. See FERC, "Water Power—Use of A Renewable Resource," at 6 (May 1988). The preemption issue has not previously arisen in California because hydropower projects have consistently complied with California's water rights laws. According to the State Board's information, 492 non-federal hydropower projects in California have acquired or have applied for water rights under California law, and, until the instant case, no hydropower project has diverted water without acquiring or claiming a water right under California law. Pet. 7 n. 1.

[3] To briefly summarize the events that led to enactment of the FPA, the Dam Act of 1906, 34 Stat. 386, prohibited construction of dams in navigable waters without approval of Congress and the Secretary of War. Pursuant to this Act, Congress and the Secretary routinely approved construction of individual hydropower projects. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 HARV. ENV. L. REV. 135, 147-149 (1986). In 1908, President Theodore Roosevelt vetoed several congressional bills authorizing hydropower projects, stating that he would approve no further projects until Congress developed a comprehensive plan for development. *Id.* at 147-149. As a result of President Roosevelt's opposition, hydropower development ground to a halt. *Id.* From 1914 to 1920, Congress considered several bills designed to regulate hydropower development, finally enacting the FPA in 1920. See pages 23-35, *infra*. As will be explained, the legislative history indicates that Congress intended to remove federal obstacles that impeded hydropower development, and also intended to preserve the states' traditional water rights authority over the projects. *Id.*

The FPA contains two provisions that preserve the states' traditional water rights authority over hydropower projects. Section 9(b) requires an applicant for a FERC license, as part of the application, to submit "satisfactory evidence that the applicant has complied with the requirements of" state law. 16 U.S.C. § 802(b). Section 27 provides that the FPA does not preempt state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821; see page 1, *supra*. Thus, section 9(b) requires the project operator to submit evidence of compliance with state law in applying for a FERC license, and section 27 requires the project independently to comply with state water laws irrespective of its rights and obligations under the FERC license. In short, section 9(b) describes the operator's evidentiary burden in the FERC licensing process, and section 27 describes the project's independent obligation to comply with state law outside the FERC licensing process.

In this case, the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. Rather, California contends that the project must independently comply with state flow requirements irrespective of its rights and obligations under the FERC license. Thus, this case is governed by section 27, not section 9(b). The question is the nature of the project's obligation to comply with state law outside the FERC licensing process, not the nature of the operator's evidentiary burden in the FERC licensing process.

On its face, section 27 plainly requires hydropower projects to comply with state water laws irrespective of any rights and obligations under a FERC license. The provision states that the FPA does not preempt state laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses . . . ." California's flow requirements here relate to the "control, appropriation, use, or distribution" of water for "other uses," specifically instream uses and hydropower uses. Indeed, in *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), this Court specifically held that the reference to "other uses" includes hydropower uses, rejecting the contrary implication in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). Thus, section 27 requires the Rock Creek project to comply with California's flow requirements. The project's obligation to comply with California's flow requirements is independent of, and therefore neither displaces nor is displaced by, the project's obligation to comply with FERC's lesser flow requirements.

The Ninth Circuit held that the reference in section 27 to "irrigation," "municipal" and "other uses" implies that the provision is limited to "property rights," and concluded that section 27 defers only to state *property* laws—*i.e.*, state laws defining and recognizing private water rights—but not to state *regulatory* laws. Pet. App. 8-9. If Congress had intended to limit section 27 to property rights, it would have been sufficient to simply disclaim any intent to interfere with vested rights. Instead, Congress expressly deferred to state laws relating to "control, appropriation, use, or distribution of water . . . *or* any vested right acquired therein." (Emphasis added.) The disjunctive reference indicates that state laws relating to "control, appropriation, use, or distribution" of water are greater than, and not limited to, state laws relating to "vested rights." Thus, section 27 facially includes not only state property laws, but also other state laws as well. The Ninth Circuit, by construing section 27 as limited to "property rights," rendered the first clause in section 27 a nullity.[4]

[4] Moreover, in *California v. United States*, 438 U.S. 645 (1978), this Court specifically rejected the same "property rights" argument in construing section 8 of the Reclamation Act of 1902, which was the progenitor of section 27. Section 8 requires federal reclamation projects to comply with state laws relating to "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383. In *California*, the United States argued that the reference to "irrigation" uses in section 8 implies that the provision is limited to "property rights" and therefore that the provision does not authorize state regulation of water. Brief for United States, *California v. United States*, at 36, 126-129, No. 77-285, Oct. Term 1977. This Court rejected the United States' argument, holding that section 8 authorizes state *regulation* of water uses and therefore is not limited to "property rights" in water. *California*, 438 U.S. at 665, 667; see also *United States v. California*, 694 F.2d 1171 (9th Cir. 1982) (Kennedy, J.) (on remand of *California*, state regulatory water laws held to apply to all uses of multi-purpose federal water project, including hydropower uses). Since this Court rejected the "property rights" argument in construing section 8, this Court should similarly reject the same "property rights" argument in construing section 27, since the latter provision was modeled after the former.

Under conventional preemption analysis, federal law preempts state law if (1) Congress has "occupied the field" that is the subject of state regulation, or (2) state law "conflicts" with federal law, or otherwise stands as an "obstacle" to the congressional purpose. *E.g., California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Section 27 is an anti-preemption provision in that it specifically limits the preemptive effect of the FPA. In cases involving an anti-preemption provision, it is improper to apply conventional preemption analysis to determine whether Congress has "occupied the field" or whether state law "conflicts" with federal law, because Congress has directly addressed these questions by adopting the anti-preemption provision. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482 n. 8 (2d ed. 1988).[5] The proper inquiry in such cases is to determine

[5] According to Professor Tribe:

> "The governing statute may . . . restrict its own preemptive effect . . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law . . . 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its

the meaning of the anti-preemption provision itself. See, *e.g.*, *California v. United States*, 438 U.S. 645 (1978) (interpreting section 8 of Reclamation Act of 1902); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629-633 (1981) (interpreting section 32 of Mineral Lands Leasing Act); *California Fed. Savings & Loan Ass'n v. Guerra*, ____ U.S. ____, 107 S.Ct. 683, 697 (1987) (Scalia, J., concurring). As Professor Tribe has noted, the preemption issue ultimately turns on the congressional intent, and the congressional intent is manifested in the anti-preemption provision. See note 5, *supra*. Since section 27 specifically precludes preemption of state laws, the provision makes clear that state water laws play a significant role in the federal regulatory scheme.

B. *California v. United States:* Section 8 of Reclamation Act of 1902

Section 27 of the FPA was modeled after section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior, in operating federal reclamation projects, must comply with state laws relating to the "control, appropriation, use, or distribution used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383; see note 4, *supra*. As shall be explained, the legislative history of the FPA indicates that Congress specifically followed the precedent of section 8 in enacting section 27. See pages 22-35, *infra*. The Ninth Circuit below acknowledged that sections 8 and 27 contain "virtually identical" language and that section 8 "apparently served as the drafting model for section 27." Pet. App. 9, 10.

In *California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 requires the Secretary of the Interior to comply with state regulatory water rights laws. There, the State

own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path." TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482 n. 8 (emphasis in original); see also *id.* at 510-511.

Board issued permits authorizing the Secretary to appropriate water for the New Melones Project. The permits contained several major conditions, some of which required water releases for protection of fish. 438 U.S. at 652 n. 8. This Court, reversing the Ninth Circuit, upheld the State Board's authority to impose the conditions. The Court held that section 8 requires the Secretary to acquire water rights under state law and to comply with conditions attached to the rights. *Id.* at 665, 667. According to the Court, the Secretary must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and must comply with state law in "providing distribution to individual landowners" once the water is released from the dam. *Id.* The only limitation, the Court stated, is that state laws cannot be applied if they conflict with "clear congressional directives," because Congress can adopt specific substantive goals or policies that limit state authority under section 8. *Id.* at 672, & n.25.[6]

The *California* Court emphasized that Congress has traditionally deferred to state water rights laws, stating that:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress.*" *Id.* at 653 (emphasis added).

The Court stated that a "principal motivating factor behind Congress' decision to defer to state law was . . . the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-669. The Court rejected the United States' argument that section 8 is limited to "proprietary rights" in water, stating that Congress "intended to defer to the substance, as well as the form, of state

[6] The Court remanded the case for determination of whether the State Board's conditions were inconsistent with "clear congressional directives." 438 U.S. at 679. On remand, the Ninth Circuit, in a decision authored by then-Judge Kennedy, held that none of the conditions were inconsistent with congressional directives and thus that all were valid. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

water law," and that the United States' argument would "trivialize the broad language and purpose of § 8." *Id.* at 675.[7]

Since *California* holds that section 8 requires federal reclamation projects to comply with state regulatory water laws, and since section 27 was modeled after section 8, section 27 similarly requires hydropower projects to comply with such state laws. In particular, since section 8 authorizes the states to impose conditions on federal water uses—including conditions requiring protection of fish—section 27 authorizes the states to impose similar conditions on hydropower uses. In short, section 27 imposes on private hydropower projects the same obligation to comply with state law that section 8 imposes on federal reclamation projects. The only limitation is that under section 27, as under section 8, state laws cannot be applied if they conflict with "clear congressional directives," for Congress can adopt specific substantive

[7] The decision in *California* has been followed and applied by this Court and other courts and thus has become part of the fabric of the federal reclamation laws. See *Nevada v. United States*, 463 U.S. 110, 122 (1983) (state water laws apply to federal Newlands Project in Nevada); *United States v. California*, 694 F.2d 1171 (9th Cir. 1982) (conditions imposed by State Board on federal New Melones Project are not inconsistent with "clear congressional directives" and are valid); *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985) (state water laws apply to federal Central Valley Project and hence United States has waived sovereign immunity under Administrative Procedures Act); *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986) (conditions imposed by State Board on federal Central Valley Project for protection of Delta water quality needs are not inconsistent with "congressional directives" and hence are valid); *United States v. Alpine Land & Reservoir Co., et al.*, 697 F.2d 851, 854-855, 858 (9th Cir. 1983) (state law determines beneficial uses of federal Newlands Project); *United States v. 71.22 Acres of Land*, 665 F.Supp. 885 (D. Utah 1987) (state law applies to United States' condemnation of water rights).

Additionally, Congress has codified the *California* decision by requiring the Secretary of the Interior, in operating the Central Valley Project in California, to comply with State Board conditions relating to Delta water quality to the extent that such conditions are consistent with "congressional directives." 100 Stat. 3050, 3051 (1986).

goals or policies that limit state authority under section 27. Cf. *California*, 438 U.S. at 672, & n. 25. California's flow requirements in this case do not conflict with clear congressional directives, nor does FERC argue otherwise. Rather, FERC argues that Congress has authorized FERC to exercise *exclusive* jurisdiction over hydropower projects, an argument that, in *California's* phrase, would "trivialize the broad language and purpose" of section 27. 438 U.S. at 675.[8]

FERC's exclusive jurisdiction argument would anomalously exempt private hydropower projects from state laws that apply to federal reclamation projects, notwithstanding that both projects are governed by virtually identical anti-preemption provisions. Under FERC's argument, for example, California law would apply to the federal New Melones Project on the Stanislaus River —as this Court squarely held in *California*—but not to a private hydropower project located directly above or below the federal project in the same river. This result would create the "legal confusion" that, as this Court stated in *California*, "would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 668-669. Congress, by following the precedent of section 8 in enacting section 27, clearly intended no such anomaly.

[8] In its opposition to the petition for writ of certiorari, FERC argued that its preemption view is supported by the Electric Consumers Protection Act (ECPA), 100 Stat. 1243 (1986), which requires FERC to consider fish needs and to consider recommendations of federal and state fish and wildlife authorities. 16 U.S.C. §§ 797(e), 803(j)(1); see FERC Opp. Br. 20-21. ECPA, however, directs only that *FERC* consider certain fish needs and recommendations, and does not preclude the *states* from considering similar needs or recommendations. Hence, ECPA contains no "congressional directive," "clear" or otherwise, precluding the application of state flow requirements here. Moreover, ECPA specifically disclaims any intent to "alter or establish the respective rights of States, the United States, . . . or any person with respect to any water or water related right . . . ," 100 Stat. 1259, thus making clear that ECPA does not diminish state water rights authority under section 27.

Indeed, there is a stronger basis for applying state law in the hydropower context here than in the reclamation context in *California*. Federal reclamation projects are authorized and funded by Congress, and are built and operated by federal agencies for public purposes. Private hydropower projects, on the other hand, are built and operated by private entities for profit purposes, and are *not* authorized or funded by Congress. Moreover, federal reclamation projects serve important national goals, and private hydropower projects serve more local goals. As the Ninth Circuit has stated:

> "[T]he position of a licensee [under the FPA] is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the national interest on a national scale; the licensee often acts on a local scale, on projects thought to be of insufficient dimension to warrant the exercise of national power." *Public Utility Dist. No. 1 v. Seattle*, 382 F.2d 666, 669-670 (9th Cir. 1967).

Indeed, the federal New Melones Project involved in *California* stored 2.4 *million* acre-feet of water for agricultural, domestic, hydropower, instream and other uses, *California*, 438 U.S. at 645, and the Rock Creek project involved here stores only 2.7 acre-feet of water solely for hydropower uses. License Order, at 2 (J.A. 14). Most importantly, this Court has applied a stricter standard in determining whether Congress has waived sovereign immunity to authorize state regulation of federal facilities, than in determining whether state laws apply to private activities notwithstanding preemption claims. Compare *Hancock v. Train*, 426 U.S. 167, 179 (1976) (federal facilities), with *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (private activities). If Congress intends to defer to state laws applicable to congressionally-authorized *federal* projects that serve important national purposes, *a fortiori*, Congress intends to defer to state laws applicable to profit-oriented *private* projects that serve essentially local purposes.

In the proceedings below, FERC argued that *California* is distinguishable because FERC has "comprehensive" authority to "regulate" hydropower development and the Secretary of the Interior—who administers the federal reclamation program involved in *California*—lacks comprehensive authority and exercises primarily an operational function. Congress, however, has adopted the same anti-preemption provision for both programs, thus making clear that state laws apply to both programs regardless of their differences. Moreover, the similarities of the programs are stronger than their differences in any event. Both programs provide for federal *development* of water for specified economic purposes, and both create federal agencies that are responsible for providing such development. Although the agencies' functions are different in some respects, Congress has narrowed the differences by providing for extensive regulation of federal reclamation projects, both in the original 1902 act and in supplementary reclamation statutes.[9] The Secretary of the Interior has narrowed the differences further by operating the projects in conformity with engineering and feasibility reports that provide *de facto* regulation of the projects. See, *e.g.*, H.R. Doc. No. 453, 87th Cong., 2d Sess. (1962) (feasibility report for New Melones Project). Also, both programs provide for development of a resource—water—that the states have traditionally regulated and controlled. Because of the similarities of the programs, particularly with respect to their anti-preemption provisions, there is no basis for construing their preemptive effects differently.

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[9] The original 1902 Reclamation Act established acreage limitations, construction charges, repayment obligations, contract terms, and beneficial use requirements. 32 Stat. 388-390 (1902), 43 U.S.C. § 371 *et seq.* Amendatory reclamation statutes authorize operation of reclamation projects for multiple purposes, provide for reimbursement and non-reimbursement of certain project functions, and modify the original acreage limitations. See, *e.g.*, Reclamation Project Act of 1939, 43 U.S.C. § 485h; Reclamation Reform Act of 1982, 96 Stat. 1263. Recent federal environmental statutes also apply to and constrain the operation of federal reclamation projects. See, *e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c; Endangered Species Act, 16 U.S.C. § 1521; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

II. CONGRESS' TRADITIONAL DEFERENCE TO STATE WATER LAWS SUPPORTS THE CONCLUSION THAT CONGRESS DEFERRED TO STATE LAWS IN ENACTING SECTION 27

Congress' historic policy of deference to state water law strengthens the conclusion that Congress intended to defer to state water laws under the FPA. As this Court noted in *California*, Congress traditionally has followed a policy of "purposeful and continued deference to state water law." 438 U.S. at 653. The congressional policy of deference underlies section 8 of the 1902 Reclamation Act, *id.*, which was the progenitor of section 27. In effect, Congress has recognized that the states have primary responsibility for regulating water rights in our federal system. Congress presumptively does not intend to preempt state laws in areas traditionally regulated by the states unless Congress clearly manifests its intent. See, *e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983). As this Court recently stated:

> "When Congress legislates in a field *traditionally occupied* by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*" *California v. ARC America Corp., et al.*, ____ U.S. ____, 109 S.Ct. 1661, 1665 (1989), quoting from *Rice*, 331 U.S. at 230 (emphasis added).

Section 27, far from reflecting a "clear and manifest purpose" to preempt state water laws, expressly defers to such state laws. The historical force and pervasiveness of Congress' policy of deference to state water law strengthens the conclusion that this policy underlies section 27.

1. The Equal Footing Doctrine

The policy of deference to state water law originated in the equal footing doctrine, which rests on a constitutional foundation. *California*, 438 U.S. at 654-655. Under this doctrine, the western states whose domain is largely owned by the federal government acquire the same sovereign interests in navigable waters that were

retained by the original states; hence, the western states possess sovereign right, title and interest to all navigable waters within their borders, subject to Congress' power to regulate commerce and navigation. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 14-15, 16, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The states' sovereign interests are "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference with private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The states' sovereign interests include not only proprietary *ownership* of beds and banks of navigable waters, but also the right to *regulate* allocation and use of water itself. *California*, 438 U.S. at 654-655, 663; *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907). Most western states have codified these principles of sovereignty, providing that water is the "property" of the people or that water use is a "public use" subject to state regulation and control. See, *e.g.*, Cal. Water Code § 102 ("property"); COLO. CONST., Art. XVI, § 5 (same); MONT. CONST., Art. III, § 5 ("public use"); CAL. CONST., Art. X, § 5 (same).

The states' sovereign interests in navigable waters include the right to regulate and conserve fish resources for the benefit of the whole community. *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876); *Manchester v. Massachusetts*, 139 U.S. 240, 259-260 (1891); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). In *McCready*, this Court stated that:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. [Citations omitted.] *In like manner, the States own the tide-waters themselves, and the fish in them*, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. [Citation omitted.] The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted

> to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State*, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstruction of navigation." 94 U.S. at 395 (emphasis added).

See also *People v. Truckee Lumber Co.*, 116 Cal. 397, 399-400 (1897); *People v. California Fish Co.*, 166 Cal. 576, 584-585 (1913). In this case, California adopted its flow requirements in order to conserve a fish resource that belongs to all the people of California. Although the states' sovereign authority to regulate fish is not without limitation,[10] such sovereign authority is entitled to deference in construing a congressional statute that preserves state water rights authority.

2. The Severance Principle

In the nineteenth century, Congress enacted several public lands and mining statutes that "severed" the water from the public lands, thus lending congressional imprimatur to the constitutional principle that the states have sovereign interests in their internal waters. In the Mining Acts of 1866 and 1870, 14 Stat. 251 (1866), as amended, 16 Stat. 217 (1870), 43 U.S.C. § 661, Congress protected water rights recognized under state and local law from claims of the United States and its patentees. In the Desert Land Act of 1877, 19 Stat. 377 (1877), 43 U.S.C. §§ 321-

[10] The Commerce Clause of the U.S. Constitution, Art. I, § 8, Cl. 2, prohibits the states from imposing unreasonable burdens on interstate commerce, and the Privileges and Immunities Clause, Art. IV, § 2, Cl. 1, prohibits the states from discriminating against citizens of other states. This Court has held that these constitutional provisions restrict the states' sovereign proprietary interests in fish and game resources. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Commerce Clause); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 384-385 (1978) (Privileges and Immunities Clause); *Toomer v. Witsell*, 334 U.S. 385 (1948) (same). These constitutional limitations do not apply here because the State Board's flow requirements do not burden interstate commerce or discriminate against citizens of other states.

323, Congress provided that unappropriated water "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes. . . ." In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court held that these statutes "effected a *severance* of all waters upon the public domain, not theretofore appropriated, from the land itself." 295 U.S. at 162 (emphasis added). Under the severance principle, water rights in our federal system are controlled by state law, not federal law. *California Oregon Power*, 295 U.S. at 158-165; *California v. United States*, 438 U.S. at 657-658; *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937). Indeed, Congress has continued its policy of deference in recent enactments. For example, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by" the Act. 33 U.S.C. § 1251(g). Thus, Congress has traditionally deferred to state water rights laws, rather than adopting a uniform national law. It is improbable that Congress meant to abruptly change its policy in enacting the FPA. In enacting section 27, Congress plainly indicated that no change was intended.[11]

An eloquent expression of Congress' deference to state water law is found in the Senate report relating to the McCarran Amendment, 43 U.S.C. § 666(a), which provides for state court jurisdiction over federal water claims. This report, as quoted in *California*, stated that:

[11] In *New Mexico*, this Court cited a 1964 Senate report that, in the Court's words, listed "37 statutes in which Congress has expressly recognized the importance of deferring to state water law," commencing with the Mining Acts of 1866 and 1870. Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation, Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-310 (1964) (hereinafter "S. 1275 Rep."), cited in *New Mexico*, 438 U.S. at 702, & n. 5. One of the statutes listed in the Senate report is section 27 of the FPA. S. 1275 Rep., at 306.

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. . . . [¶] Since it is clear that the States have the control of water within their boundaries, *it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.*" S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951), quoted in *California,* 438 U.S. at 678-679 (emphasis added).

Notwithstanding Congress' traditional deference to state water laws, Congress retains paramount constitutional authority to regulate navigation and to reserve water for use on federal lands. See, *e.g., United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913) (federal navigation power); *United States v. New Mexico,* 438 U.S. 696, 702 (1978) (federal reserved rights). FERC does not assert authority under the federal navigation power or the reserved rights doctrine in this case, and therefore neither limitation applies here. The question here is the extent to which Congress has statutorily deferred to state water law, not the scope of Congress' constitutional power to regulate water use. As this Court has noted, " '[E]xcept where the reserved rights or navigation servitude of the United States are involved, the State has total control over its internal waters.' " *California,* 438 U.S. at 662, quoting from *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703 (1899). Since these federal limitations do not apply in this case, California has "total control" of its internal waters here.

III. THE LEGISLATIVE HISTORY OF SECTION 27 INDICATES THAT CONGRESS INTENDED TO DEFER TO STATE REGULATORY WATER LAWS

The legislative history of the FPA provide the strongest indication that Congress intended to defer to state water rights laws. Congress debated the subject of hydropower legislation from 1914 until the FPA was enacted in 1920. As shall be seen, two

overarching themes dominated these debates. First, Congress intended to promote hydropower development by concentrating all *federal* licensing authority in a single agency, rather than continue to have such authority dispersed among several federal agencies. Second, and more importantly here, Congress intended to preserve the states' traditional water rights authority over hydropower projects, thus continuing and extending its policy of deference to state law. Indeed, the legislative history indicates that Congress, in enacting section 27, specifically followed the precedent of section 8 of the 1902 Reclamation Act, which requires the Secretary of the Interior to comply with state water laws. In Congress' mind, the federal government owned the public lands and the states owned the water, and Congress wanted to make federal lands available for hydropower development without diminishing state water rights authority over the projects. Thus, Congress intended to develop a federal program in conformity with rather than in derogation of state water laws.

A. H.R. 16673 (63rd Congress)

The language of section 27 first appeared in section 14 of H.R. 16673, a hydropower bill introduced in 1914.[12] Congressman Mondell of Wyoming, the principal author of section 8 of the 1902 Reclamation Act, stated that section 14 recognized state primacy over water rights regulation, declaring that:

> "Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public land States is a right received from the people of the States and not from the Federal Government. The people of the Commonwealths of the West are the owners and proprietors of all the waters within their borders, and the only right that any individual can have or secure, at least in the majority of

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[12] Section 14 provided:
"That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder." H.R. Rep. No. 842, 63d Cong., 2d Sess. 4 (1914).

the public-land States, is the right to use the water at a certain designated place for a specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. *The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water* or to use a drop of water for the turning of any wheel or turbine. *That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States.*" 51 Cong. Rec. 13630 (1914) (remarks of Rep. Mondell) (emphasis added).

Congressman Mondell stated that section 14 continued the policy of deference to state water law established in section 8 of the 1902 Reclamation Act, declaring that:

> "[T]here is nothing in the law that any way conflicts or comes in contact with *the right of a State to say who shall use the water and how it shall be used*. . . . It [section 14] is somewhat similar to the provision contained in the reclamation law. . . ." *Id.* at 13631 (emphasis added).

Congressman Taylor of Colorado, who authored section 14, declared that the provision was patterned after section 8, stating that:

> "[T]he thought before the committee was . . . for the express protection of the States; and inasmuch as it went as far and in language *substantially the same as section 8 of the reclamation law*, we thought that the courts would construe that it was the intention of Congress to protect our rights." *Id.* (remarks of Rep. Taylor) (emphasis added).

More pointedly, Congressman Taylor stated that:

> "*I took this language of section 14 from section 8 of the reclamation bill and inserted it in this bill.*" *Id.* at 14067 (emphasis added).

Congressman Taylor stated that section 14, as well as section 8, followed the precedent of the Mining Acts of 1866 and 1870, *id.*,

which as noted earlier provided the basis of the severance principle enunciated in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). See pages 20-21, *supra*. Congressman Taylor also noted that section 14 followed the principle enunciated in *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907), which holds that the states have "proprietary" ownership of navigable water under the equal footing doctrine. 51 Cong. Rec. 14067-14068 (1914); see page 19, *supra*.

Congressman Raker of California reaffirmed that section 14 continued the policy established in section 8, stating that:

> "*[S]ection 14 of this act does what is done in the original reclamation act. . . .* [¶] *It is generally conceded by all that the water belongs to the States.* The National Government is not dealing in this bill with water or water rights that it does not control; and when Congress passed the reclamation law it put in this provision, so as to make it plain and clear that the National Government was not attempting or intending in any way to legislate upon water rights over which it did not pretend to have any control. . . . [¶] *[T]his bill does not intend to legislate in regard to water rights.*" 51 Cong. Rec. 14070 (1914) (emphasis added) (remarks of Rep. Raker).

A colloquy between Congressman Raker and Congressman Stevens of New Hampshire made clear the primacy of state water law:

> "Mr. STEVENS: Suppose the State of Colorado has laws governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act. Which would govern, the State law or this law?
>
> "Mr. RAKER: . . . [T]he State law in regard to water rights, in regard to acquisition, and in regard to use, ought to remain in the State, where it now is. And if there is any possibility of the Government having any control of it, it ought not to have any, because it is practically recognized by all that the water right and its control is a State function, the property of the State. *You get your water right from the State.*

"Mr. STEVENS: . . . *You answer that question, then, by saying that the State law would control?*

"Mr. RAKER: *Yes.*" *Id.* at 14070-14071 (emphasis added).

Congressman Taylor supported Congressman Raker's interpretation of section 14, stating that:

> "A power company [under section 14] must come in and put itself on the same footing and equality with other appropriators of water and make an appropriation under our laws so that those that are ahead will be ahead of water-power companies authorized under this act; and those who are behind will be behind the new power company; in other words, *they will have to come in on an equality with all other water users and acquire and use their water rights under our State water-rights laws* and under the acts of Congress and laws by which those rights were acquired." *Id.* at 14071 (remarks of Rep. Taylor) (emphasis added).

Congressman Seldomridge of Colorado supported Congressman Taylor's interpretation, stating that:

> "The gentleman is right. *The power company will have to come in and conform to the laws of the State.* [¶]. . . *There must be some clear and definite declaration made in this legislation that Congress does not intend to question the right of the State to control the waters of the State.* The powers and privileges granted by this act must be subject to this recognition, and the presence of this section in the bill is necessary to inform all intending lessees of water-power sites under Federal jurisdiction that while they can operate under Federal law as far as the land is concerned, . . . yet when they come to the use and appropriation of water that they must recognize the laws of the State as superior to any Federal grant. [¶] . . . The operation of hydroelectric power companies does not present any complicated problem that can not be regulated by State law. The people are well informed in these days of the dangers and abuses of monopolies. They are protecting themselves by municipal, State, and national legislation. The Government with all of its national obligations can well afford to relieve itself of responsibilities and powers that can be more satisfactorily exercised by the States." *Id.* (remarks of Rep. Seldomridge) (emphasis added).

Although the House approved H.R. 16673, the Senate failed to approve the bill because of its objection to a provision imposing water use fees against licensed hydropower projects. In the Senate's view, the federal government potentially lacked constitutional authority to impose the fees because the states "owned" the water. S. Rep. No. 898, 63d Cong., 3d Sess. 1 (1915); H.R. Rep. No. 61, 66th Cong., 1st Sess. 4 (1919); 59 Cong. Rec. 1040 (1920) (remarks of Sen. Nelson).[13] Indeed, the delay in enacting hydropower legislation from 1914 until 1920 was caused by Congress' doubts concerning the constitutionality of the proposed fees. See note 13, *supra*. Congress' solicitude for state "ownership" interests lends strength to the view that Congress did not intend to override traditional state water rights authority in enacting the FPA.

B. H.R. 408 (64th Congress)

In the next session, the House considered H.R. 408, which was virtually identical to H.R. 16673, the bill considered in the previous session. H.R. Rep. No. 16, 64th Cong., 1st Sess. 1 (1916). Section 14 of H.R. 408 was virtually identical to section

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[13] Senator Nelson described the congressional efforts during this period as follows:

> "The majority of the Senate held the view that, aside from the interests of commerce, . . . all other property rights in the waters of a stream belong to the respective States, and that the Federal Government ought not to charge compensation for what is State property and not Federal property; in other words, the majority of the Senate has consistently contended for the idea that the streams and rivers of the country were the property of the States in which they were situated, and that the Federal Government had control of those streams only to the extent that the interests of commerce and navigation demanded; that, aside from that, all other use and all other property in the waters belonged to the State or to riparian owners, as the case might be." 59 Cong. Rec. 1940 (1920) (remarks of Sen. Nelson).

14 of H.R. 16673, which as noted above was the predecessor of section 27. The report of the House Committee on the Public Lands contained a detailed analysis of the bill, and, under the colorful subtitle "Does Not Molest The Right Of States In Their Use Of Water," stated that:

> "The bill studiously avoids any interference with the rights of the States in handling their water power problems; it expressly disclaims any right to trample on the rights of the States and no such attempt is even thought of or intended." H.R. Rep. No. 16, 64th Cong., 1st Sess. 14 (1916).

Congressman Taylor, the author of section 14, stated that the provision was modeled after section 8 of the 1902 Reclamation Act, declaring that:

> "The gentleman from Wyoming is familiar, of course, with the fact that *this is the language that was used in the original reclamation act of June 17, 1902*, and we put it in the Hetch Hetchy California bill, and I think I may claim the authorship of it in that bill and in this and other bills, to prevent any question arising as to whether or not Congress intended to in any way interfere with our water rights or doctrine of priority; and I am confident the sentiment of the West is very much in favor of retaining this language. . . . It has been approved a number of times by Congress. I put it in this bill when we reported it last year, and the House approved of it at the time we passed the bill last year." 53 Cong. Rec. 740 (1916) (remarks of Rep. Taylor) (emphasis added).

The Report of the Senate Committee on Public Lands commented on the Senate version of H.R. 408, and contained perhaps the clearest expression of Congress' intent to defer to state water rights laws. The report stated that:

> "*The bill distinctly recognizes the ownership of and the right of control in the States of the use of the waters in the flowing streams of the States.* In cases where latent power is going to waste in the streams of the States and where the land adjacent thereto and necessary for the location of power sites belongs to the United States Government this measure recognizes that there must be cooperation between the

> States which control the water and the United States Government, which controls the land. Neither alone can successfully develop water power. There must be cooperation to attain best results, and that this bill seeks to obtain by recognizing the right of the State to the use of the water and the right of the Federal Government to the use of the land and recognizing that both are essential to development of power. [¶] This bill in no wise seeks to encroach upon, impair, or destroy any of the rights of the States. *It is not intended in any way or in any degree to trench upon the right of the State to control of the water flowing in the streams within its borders. It is framed upon the distinct theory that the State owns and controls the use of the water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public land bordering on and adjacent to such streams.* [¶] . . . *[T]he States alone cannot facilitate waterpower development nor provide legislation sufficient therefor, because the States control only the water.* It takes land as well as water in such cases to develop power. On the other hand, *the Federal Government alone can not furnish the facilities for the development of power, for the Federal Government owns only the land*, and it takes water as well as land to develop power. *Each must contribute its share. The Federal Government must contribute the use of land, and the State government must contribute the use of water. . . .*" S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) (emphasis added).

Thus, the Senate report made clear that, although the federal government owns the lands, the states control the water rights.

A colloquy between Senator Myers, Chairman of the Senate Committee on Public Lands, and Senator Borah reaffirmed the primary of state water laws:

> "Mr. BORAH: May I ask the Senator from Montana to admit that before the National Government can utilize this water for power purposes it must go under the State law and make application for the water and secure it by an appropriation the same as an individual would have to do?

"Mr. MYERS: *The Federal Government is not undertaking to utilize any water at all. It furnishes the land, and the applicant must go to the State authorities to get the water.*

"Mr. BORAH: Suppose that in the development of power under this bill it should become essential for the National Government to exercise control over some of the water, could it do so without making an application to the State authorities for the purpose of appropriating it?

"Mr. MYERS: *Under the terms of this bill I can not conceive of any contingency in which the Federal Government would undertake to control the waters of a State.*" 53 Cong. Rec. 4204 (1916) (emphasis added).

Again, the Senate did not approve the bill because of constitutional doubts concerning federal authority to impose water use charges against hydropower projects. 59 Cong. Rec. 1040 (1920) (remarks of Sen. Nelson); see note 13, *supra*.

C. S. 1419 (65th Congress)

In December 1918, President Woodrow Wilson attempted to break the deadlock over hydropower legislation, and asked the House of Representatives to establish a joint committee to consider hydropower legislation. H.R. Rep. No. 715, 65th Cong., 2d Sess. 13-14 (1918). The House formed the Joint Water Power Committee, consisting of members of the committees on Interstate and Foreign Commerce, Public Lands, and Agriculture. *Id.* The President also asked the Secretaries of War, Interior and Agriculture to draft an administration bill for hydropower development. *Id.* After the administration bill was completed, the House joint committee considered the bill in lengthy hearings. Hearings Before the House Committee on Water Power Legislation, 65th Cong., 2d Sess., pts. 1, 2, 3, 4 (1918).[14] At the

[14] The hearings made clear that the administration bill required hydropower projects to comply with state water laws. The Chief Engineer of the Forest Service, describing the provision subsequently enacted as section 9(b), testified that the license applicant "shall file, as part of his application for license, authority from the State to use the water for the purposes proposed." Hearings Before the House Comm. on Water Power Legislation, 65th Cong., 2d Sess. 97 (1918). Congressman Mondell, describing the provision subsequently enacted as section 27, testified that "no one can begin or carry out any of these power developments in the public-land States until and unless they have secured from the proper State authorities the right to divert the water." *Id.* at 654.

conclusion of the hearings, the House joint committee incorporated the administration proposal in a preexisting power bill, S. 1419, and reported the bill to the full House. The bill contained two provisions, sections 9(b) and 27, similar to the anti-preemption provisions contained in the FPA. H.R. Rep. No. 715, 65th Cong., 2d Sess. 6, 13 (1918).

The congressional floor debates relating to S. 1419 indicate that Congress intended to defer to state water law. Congressman LaFollette of Washington, a member of the House joint committee, stated that the bill recognized and respected the states' sovereign interests in their navigable waters. 56 Cong. Rec. 9108-9111 (1918) (remarks of Rep. LaFollette). LaFollette, citing this Court's decisions in *Martin v. Waddell*, 41 U.S. 367 (1842), *Kansas v. Colorado*, 206 U.S. 46 (1907), and their progeny, stated that these decisions reaffirmed "the States' sovereignty and right of control of the water, beds and banks" of navigable waters, avowing that the federal government does not have "any proprietary rights" in such waters except the right to regulate and control navigation. 56 Cong. Rec. 9109 (1918). LaFollette also declared that the bill was intended to overcome the "divided authority" that prevented hydropower development, noting that federal authority over hydropower projects was dispersed among the Secretaries of War, Interior and Agriculture. *Id.* LaFollette stated that:

"[M]any power possibilities would have long ago been developed and be giving service to man if it were not for a *divided authority. While the right of water control* and the ownership and jurisdiction of bed and banks of our watercourses *are admittedly in the States*, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Govern-

ment could intervene and stop proceedings under the plea of control of navigation." *Id.* (emphasis added).

Thus, LaFollette argued that "divided authority" was impeding hydropower development because different federal agencies could prevent the construction of hydropower projects that had acquired water rights under state law. The solution, he argued, was to concentrate federal licensing authority in a single agency and to allow the states to continue exercising water rights authority over the projects. According to LaFollette:

> "The three working together [the Secretaries of War, Interior and Agriculture, who were to serve on the Commission] can harmonize all questions involving Federal interests, and under the proposed law the would-be licensee is supposed to have procured *all concessions and necessary powers of the State or States* in which the project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution." *Id.* at 9110. (emphasis added)

LaFollette's statements indicate that Congress intended to remove *federal* obstacles to hydropower development caused by dispersal of authority at the federal level, and that Congress did not intend to remove the projects' obligation to acquire "concessions and necessary powers" from the states.[15]

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[15] LaFollette's statements related primarily to section 9(b), which describes the project operator's evidentiary burden in FERC proceedings. The congressional debates were unclear as to whether this provision requires the operator to acquire a state water right as a *condition precedent* to acquiring a FERC license, or instead whether the operator can acquire a state water right *after* acquiring a FERC license but prior to diverting water. Congressman LaFollette indicated that section 9(b) requires the operator to acquire a state water right as a condition precedent to the federal license, stating that:

> "If we make it one of the *conditions precedent* to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or a license cannot issue." 56 Cong. Rec. 9110 (1918) (remarks of Rep. LaFollette) (emphasis added).

A colloquy between Congressmen Mondell and Raker, however, suggested the opposite view. Congressman Raker offered an unsuccessful amendment to section 9(b) that would have required an applicant to show only that he had filed an "application" for a water right under state law, not that he had actually acquired the right. 56 Cong. Rec. 9812 (1918). Congressman Mondell responded that the amendment was unnecessary because section 9(b) did not require that the applicant have a "completed" water right in filing his application. 56 Cong. Rec. 9813 (1918) (remarks of Rep. Mondell). According to Mondell:

> "I think the gentleman [Congressman Raker] must have offered his amendment under a misapprehension of the meaning and effect of the provision [section 9(b)]. The gentleman is assuming that the language which he attempts to amend required a completed water right and a water-right certificate *before* the party shall be granted a license under this act or his application be considered. This is not true at all. The provision is that the applicant . . . shall have complied with all of the laws of the State applicable to the situation *up to the time that he makes his application. . . . [T]here are other requirements of State law that will apply after the license has been granted and construction begins*, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements." *Id.* (emphasis added).

This colloquy suggests that section 9(b) requires the applicant to show the steps taken to comply with state water law prior to filing his application with FERC, and that section 27—which, in Congressman Mondell's words, requires compliance with "other requirements of state law that will apply after the license has been granted"—requires the applicant to acquire a "completed" state water right prior to diverting water.

Other congressmen supported the same view. Congressman Mondell stated that:

> "The waters belong to the people of the States and the only property that the Federal Government has is land. . . . *The bill . . . expressly disavows any intent or purpose of taking*

over control of the waters from the States." 56 Cong. Rec. 9113, 9114 (1918) (remarks of Rep. Mondell) (emphasis added).

Congressman Taylor stated that:

> "[A]fter strenuous efforts I succeeded . . . in getting section 27 into this bill, which is the saving clause of our irrigation rights and is *copied from the reclamation act.*" *Id.* at 9115 (remarks of Rep. Taylor) (emphasis added).

Congressman Doremus stated that "water-power companies organized under this act will be obliged to operate under the laws of the various States." *Id.* at 9768. Congressman Raker stated that the federal licensee "gets its rights by applying to the State for it . . . ." *Id.* at 9902. Congressman Myers stated that:

> "I believe that it is the intention of the bill, as it was of bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of public lands through which the water flows. *It is not intended to interfere with the ownership and control by the State of those waters. . . .* [¶] *The State controls the use of the water, the Federal Government controls the use of the public land through which the water flows. The consent of each must be obtained.*" *Id.* at 10494 (remarks of Rep. Myers) (emphasis added).

The House and Senate passed different versions of S. 1419 and the differences were resolved in a conference bill. H.R. Rep. No. 61, 66th Cong., 1st Sess. 1 (1919). The House approved the conference bill, but the Senate failed to approve the bill before the end of the session. *Id.* In the next session, Congress enacted H.R. 3184, which was identical to S. 1419, and President Wilson signed the measure into law. *Id.*[16] After years of deliberation, the

[16] The Senate debate relating to H.R. 3184 reaffirmed Congress' intent to defer to state water laws. Senator King of Utah inquired whether the bill would create an "oppressive and bureaucratic system of [federal] licensing" that would be "oppressively laid upon the States." 59 Cong. Rec. 1040 (1920) (remarks of Sen. King). Senator Nelson, who led the floor discussion of the bill, denied the charge and referred Senator King to section 27 of the bill. *Id.* at 1040 (remarks of Sen. Nelson).

FPA finally became law. The FPA contained two provisions, sections 9(b) and 27, that recognized state water rights authority over hydropower projects.

D. Summary

The legislative history makes clear that Congress, in enacting section 27, continued and extended its traditional policy of deference to state water law. Indeed, the legislative history indicates that Congress specifically followed the precedent of section 8 of the 1902 Reclamation Act, which makes state water laws applicable to federal reclamation projects. Hence, the congressional policy of "purposeful and continued deference to state law" that informs section 8, *California*, 438 U.S. at 653, equally informs section 27. In effect, Congress required hydropower projects to comply with state water laws to the same extent that federal reclamation projects must comply with state laws. In light of the progenitive relationship between sections 8 and 27, there is no principled basis for construing the provisions differently.[17]

[17] Following enactment of the FPA in 1920, FERC's predecessor, the Federal Power Commission (FPC), consistently construed the FPA as requiring federally-licensed hydropower projects to comply with state water laws. See, *e.g.*, FPC, Third Annual Report, at 8 (1923); FPC, Fourth Annual Report, at 10- 11 (1924); FPA, Seventh Annual Report, at 3 (1927). For instance, the FPC stated in 1924 that:

> "The development of water power on the lands of the United States requires the approval of both the State and Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority." FPC, Fourth Annual Report, at 10-11 (1924).

Indeed, the FPC stated in 1927 that the states have the right to "veto" hydropower projects that are unable or unwilling to comply with state water laws. FPC, Seventh Annual Report, at 3 (1927). In 1931, the FPC stated that:

> "Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges and benefits of the State

IV. THIS COURT'S DECISION IN *FIRST IOWA* IS DISTINGUISHABLE HERE, AND ITS DICTUM CONCERNING SECTION 27 IS INCORRECT

The Ninth Circuit held that the preemption issue here is controlled by *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). Pet. App. 10. In *First Iowa*, the FPC denied a license application for a hydropower project on grounds that the project had failed to acquire a use permit as required under Iowa law.[18] The denial was based on section 9(b) of the FPA, which requires project operators to submit "satisfactory evidence" of compliance with state law in applying for a FERC license. 16 U.S.C. § 802(b). This Court overturned the FPC order on grounds that section 9(b) does not require the project operator to acquire a state permit as a condition precedent to acquiring an FPC license. According to the Court, section 9(b) merely requires operators to provide

in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantages of its citizens." FPC, Eleventh Annual Report, at 12 (1931).

The FPC's administrative practice is described more fully in the *amici curiae* brief of the States of Idaho, *et al.*, and will not be repeated here. The FPC's contemporaneous construction is relevant because "particular weight" is accorded the "*contemporaneous* construction" of a statute by the agency charged with its enforcement. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1979) (emphasis added), quoting from *Norwegian Nitrogen Co. v. United States*, 228 U.S. 294, 315 (1933). California has lodged the foregoing FPC reports with the Clerk with a request that they be judicially noticed.

[18] The relevant Iowa statute prohibited the construction of a dam without a use permit issued by the Iowa Executive Council, and provided for issuance of the permit only if the dam would not materially obstruct navigation or other "public rights" and only if the diverted water was returned to the stream without diminution of quantity or quality. 328 U.S. at 165-166. The Iowa statute did not define or otherwise relate to the riparian or appropriative water rights of the dam operator, and indeed the hydropower project in *First Iowa* possessed necessary riparian water rights under Iowa law. 328 U.S. at 158. Hence, *First Iowa* was not a water rights case, unlike the instant case.

"information" in the FPC proceedings concerning steps taken to comply with state law, but does not substantively require projects to acquire a state permit as a "condition precedent or administrative remedy that must be exhausted before securing a federal license." *Id.* at 170, 175. Otherwise, the Court stated, Iowa would have a "veto power" over the project, thus creating a "dual system of control" that would be "unworkable." *Id.* at 164, 167-168.

The *First Iowa* Court distinguished section 9(b) from section 27, stating that the latter provision, unlike the former, requires substantive compliance with state water law. 328 U.S. at 175-178. The Court then commented on section 27 itself, stating that the reference to "irrigation," "municipal" and "other uses" implies that provision is limited to "proprietary rights" and thus does not authorize state "regulation" of hydropower uses. *Id.* at 175-176. Since the Court *held* only that section 9(b) does not require a state permit as a "condition precedent" to a FERC license, the Court's comments concerning section 27 were dictum.

A. Invalidity of *First Iowa* Dictum After *California*

The *First Iowa* dictum concerning section 27 is invalid after this Court's decision in *California v. United States*, which was decided thirty-two years after *First Iowa*. In *California*, this Court held that section 8 of the 1902 Reclamation Act requires the Secretary of the Interior to acquire water rights under state law and to comply with conditions attached to such rights. 438 U.S. at 665, 667. Since section 27 was modeled after section 8, *California* supports the view that section 27 imposes the same obligation on private hydropower projects. Indeed, *California* specifically rejected the argument that the reference in section 8 to "irrigation" uses implies that the provision is limited to "proprietary rights," which was the same argument that *First Iowa* upheld in construing section 27. See note 4, *supra*. The *California* Court stated that the "proprietary rights" argument "would trivialize the broad language and purpose of § 8." 438 U.S. at 675. In light of the progenitive relationship between the provisions, the "proprietary rights" argument would equally trivialize the broad language and purpose of section 27. Hence, after *California*, the *First Iowa*

dictum that section 27 is limited to "proprietary rights" cannot be sustained.

Indeed, the *First Iowa* dictum was specifically based on the premise that section 8 of the 1902 Reclamation Act is limited to "proprietary rights," and *California* flatly rejected this premise. The *First Iowa* Court stated that section 27 is "similar to" section 8 in that both require compliance with state laws relating to the "control, appropriation, use, or distribution" of water. 328 U.S. at 176 n. 20. The Court then stated that:

> "The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to *proprietary rights under the reclamation law and in public lands, carries that established meaning [of section 8] into the Federal Power Act*, in the absence of anything in the Act calling for a different interpretation of the language." *Id.* (emphasis added).

Thus, in *First Iowa*'s view, section 27 "carries" the established meaning of section 8 "into" the FPA, and—since section 8 is limited to "proprietary rights"—section 27 is similarly limited. To be sure, *First Iowa*'s view that section 8 is limited to "proprietary rights" was consistent with this Court's contemporaneous view of that provision, as expressed in dicta in *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 292 (1958), and *City of Fresno v. California*, 372 U.S. 627, 630 (1963). In *California v. United States*, however, this Court specifically "disavow[ed]" the dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights." 438 U.S. at 672-674, & n. 24. The *California* Court ruled that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.'" *Id.* at 675. Since *California* rejected the argument that section 8 is limited to "proprietary rights," *California* rejected the premise of *First Iowa's* dictum concerning section 27.[19]

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[19] In two other cases—one decided before and the other after *First Iowa*—this Court held that section 27 precludes FPC licensees from interfering with prior water rights recognized under state law, but the Court did not consider whether section 27 authorizes state regulation of hydropower water uses. *Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930) (FPC licensee cannot divert water belonging to upstream riparian user whose rights are recognized under state law); *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) (FPC licensee must respect usufructuary water rights recognized under state law). In construing section 27, *Niagara Mohawk* specifically relied on *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which held that section 8 of the 1902 Reclamation Act does not authorize federal acquisition of water rights without payment of compensation. *Niagara Mohawk*, 347 U.S. at 255. Since *Niagara Mohawk* relied on section 8 in interpreting section 27, *Niagara Mohawk* supports the view that the provisions should be construed congruently. This view is also supported by *Gerlach* itself, which states that section 8 "parallels" section 27. 339 U.S. at 734.

B. Inconsistency of *First Iowa* Dictum With Legislative History

The *First Iowa* dictum is inconsistent with the legislative history of section 27, which unequivocally indicates that Congress intended to defer to state regulatory water laws. See pages 22-35, *supra*. Indeed, the *First Iowa* Court did not refer to the voluminous legislative history concerning section 27 described earlier in this brief, and the parties did not provide this full legislative history to the Court. The *First Iowa* Court stated, however, that its "proprietary rights" theory was consistent with Representative LaFollette's assertion that section 9(b) preserves "property rights of the State" and that Congress was attempting to overcome "divided authority." 328 U.S. at 174; see 56 Cong. Rec. 9810 (1918) (remarks of Rep. LaFollette). As we have noted, LaFollette's reference to state "property rights" was a reference to state "proprietary" rights in water under the equal footing doctrine, and, as LaFollette directly observed, this Court has held that such state "proprietary" rights include the right to regulate water use. *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907); see *California*, 438 U.S. at 654-655; see page 31, *supra*. As we have also noted, LaFollette's reference to "divided authority" indicated only that all *federal* licensing authority should be concentrated in a single agency, not that state water laws should be displaced. See pages 31-32, *supra*.

C. Dual Regulatory Systems

The *First Iowa* Court, stating that a dual regulatory system would be "unworkable," 328 U.S. at 167-168, appeared to regard dual systems as suspect if not inherently improper. Indeed, the Court almost seemed to adopt a federal common law rule presumptively construing federal statutes against dual systems.[20] More recently, however, this Court has often sustained dual systems, correctly reasoning that the choice belongs to Congress and not the courts. In *California*, for example, this Court upheld a dual regulatory system in the field of reclamation, stating that state laws apply to federal reclamation projects to the extent that state laws are not inconsistent with "clear congressional directives." 438 U.S. at 672, & n. 25.

In fact, Congress often provides for concurrent federal and state jurisdiction over activities that affect both national and state interests. For example, the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, authorizes the Army Corps of Engineers (ACE) to exercise permit authority over activities affecting navigable waters. The ACE's permit authority extends to diversions from navigable waters authorized under state water rights laws. See *California v. Sierra Club*, 451 U.S. 287 (1981). In effect, the ACE and the states exercise concurrent jurisdiction over water diversions that affect both federal navigation interests and state water rights interests. Moreover, the ACE considers many of the same "public interest" factors that the states consider in exercising their water rights authority. Compare 33 CFR § 320.4(a), 40 Fed. Reg. 31326-31327 (1975), with Cal. Water Code §§ 1253, 1255, 1257. Nonetheless, this Court has held that

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[20] In a recent case, the Ninth Circuit purported to rely on the "*First Iowa* doctrine" in holding that the states cannot permissibily regulate activities that are regulated by federal permit programs, thus apparently construing *First Iowa* as adopting a common law doctrine precluding dual systems. *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1082, 1083 (9th Cir. 1985), *rev'd sub nom* 480 U.S. 572 (1987). This Court reversed the Ninth Circuit decision without making reference to any "*First Iowa* doctrine." 480 U.S. 572. The Ninth Circuit's reference to such a "doctrine" demonstrates the continuing mischief caused by the *First Iowa* analysis.

an ACE permit does not relieve the permittee of his obligation to comply with state water rights laws. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903).[21] As this Court has stated in another context, the federal license is "simply acknowledgement that the activity does not violate federal law, and is not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Similarly, a FERC license is an "acknowledgement" that the activity does not violate federal law, not an exemption from state water rights laws. Contrary to the *First Iowa* dictum, dual systems are neither unprecedented nor "unworkable."[22]

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[21] In *Cummings*, this Court stated that:

> "[T]he act of 1899 does not manifest the purpose of Congress . . . to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. . . . [U]nder existing legislation they [private parties] must, before proceeding under such an authority, obtain . . . the assent of the State acting by its constituted agencies." 188 U.S. at 431.

[22] Congress has provided for concurrent state jurisdiction over other kinds of federally-licensed activities. See, *e.g.*, *Hillsborough County Florida v. Automated Medical Laboratories*, 471 U.S. 707 (1985) (state operating requirements apply to blood plasma vendors licensed under federal law); *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) (state economic regulation applies to nuclear power facilities licensed by the Atomic Energy Commission); *Rice v. Rehner*, 463 U.S. 713 (1983) (state licensing requirements apply to federally-licensed Indian traders on Indian reservations); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (state licensing requirements apply to marine terminal facilities licensed under federal law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state certification requirements apply to agricultural commodities certified under federal marketing orders); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state conservation laws apply to fish traps authorized by permits issued by U.S. Forest Service); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (state regulations apply to smoke emissions of vessels licensed under federal law); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207-208 (1944) (state licensing

D. Distinction Between *First Iowa* and Instant Case

The actual holding in *First Iowa* is distinguishable here. The *First Iowa* Court held that section 9(b) is an "informational" provision only and thus does not require a hydropower project to acquire a state permit as a "*condition precedent* or administrative remedy that must be exhausted *before securing a federal license*." 328 U.S. at 170 (emphasis added). Indeed, the petition for writ of certiorari in *First Iowa* framed the question in terms of whether section 9(b) required a state permit as a "condition precedent" to a FERC license.[23] This question is inapposite here because the Rock Creek project has already acquired a FERC license and California does not challenge the issuance of the license. Instead, the question here is whether section 27—as opposed to section 9(b)—independently requires the project to comply with state water laws irrespective of its rights and obligations under the FERC license. In other words, the question is whether the project must acquire a state water right prior to diverting water, and must thereafter comply with conditions attached to the right. This question was not presented in *First Iowa*, which focused on the meaning of section 9(b) in FERC proceedings. Conceivably section 9(b) might be construed, as in *First Iowa*, as an "informational" provision that does not require a state permit as a "condition precedent" to a FERC license, even though section 27 requires, and must be construed as requiring, substantive compliance with state water laws. Although we take no position concerning the proper construction of section 9(b), this suggested construction would enable the Court to sustain California's position here without overturning its actual holding in *First Iowa*.[24]

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requirements apply to custom house brokers licensed under federal law); *United States Steel Corp. v. Train*, 566 F.2d 822, 830, & n. 5 (7th Cir. 1977) (state has concurrent jurisdiction to regulate water pollution under section 510 of Clean Water Act).

[23] The petition for writ of certiorari in *First Iowa* stated that:
"The dominant issue underlying the questions presented is whether *Section 9(b) of the Federal Power Act*, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a *condition precedent* to the issuance of a federal license under Part I of the Federal Power Act." Pet. for Writ of Cert., *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, at 8-9, No. 603, Oct. Term, 1945 (emphasis added).

V. FERC'S PREEMPTION ARGUMENT WOULD (1) RESULT IN POTENTIALLY INCONSISTENT REGULATION OF WATER RIGHTS IN THE SAME RIVER AND (2) IMPAIR THE STATES' INTERESTS IN ALLOCATING THEIR LIMITED WATER SUPPLY AMONG COMPETING NEEDS

A. Inconsistent Water Rights Regulation

Congress, in its traditional deference to state water rights laws, has recognized the need for coordinated state management and regulation of water rights in individual river systems. As this Court has stated, water rights are "highly interdependent" because many users compete for a finite and scarce resource that is often inadequate to serve all needs, and hence there is a need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); see *Nevada v. United States*, 463 U.S. 110, 140 (1983). FERC's preemption argument would impair the states' ability to coordinate and manage water rights by exempting hydropower projects from state laws that apply to all other users in the same river, including, after *California*, the United States

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[24] Additionally, such a construction would avoid creating a conflict between federal and state law, because state water laws typically provide only that appropriators must acquire water rights prior to diverting water, see, *e.g.*, Cal. Water Code § 1225, not that hydropower projects must acquire state permits as a "condition precedent" to acquiring FERC licenses. Such a construction does not impair state water rights interests because it is often inefficient for states to conduct lengthy water rights hearings for projects that are unlikely to acquire FERC licenses. As noted earlier, the legislative history of the FPA—although clearly indicating that hydropower projects must acquire state water rights and comply with conditions attached to the rights—is unclear on whether a state water right is a "condition precedent" to the FERC license. See note 15, *supra*.

itself. In effect, FERC's argument would create two bodies of law in the same river—a body of FERC-created law applicable to hydropower projects and a body of state law applicable to all other users—thus causing potentially inconsistent regulation of water rights in the same river.

To provide an example of such potentially inconsistent regulation, suppose that a hydropower project in a particular river is sandwiched between an upstream municipal diversion project and a downstream federal reclamation project. Clearly the upstream municipal project must comply with state law. After *California*, the downstream federal project must also comply with state law. Under FERC's argument, the hydropower project located between these projects need *not* comply with state law. Thus, the state would be unable to provide for coordinated management of water rights for the three projects. If, for example, the state established minimum flow requirements for all three projects for the protection of fish, the hydropower project could capture for its own use the flows that the state requires to bypass other upstream projects, thus defeating the purpose of the state flow requirements as applied to the other projects. The state cannot effectively manage and coordinate water rights unless state laws apply to *all* users, including hydropower projects. As Congress has declared, "[I]t is essential that each and every owner along a given water course . . . must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951), quoted in *California*, 438 U.S. at 678-679.

Indeed, FERC's preemption argument would result in potentially inconsistent regulation of *hydropower* projects, in that *private* hydropower projects would be exempt from state laws that apply to *federal* hydropower projects. Congress, in authorizing federal reclamation projects, often provides that the projects must serve multiple purposes, including hydropower uses. See, *e.g.*, *California*, 438 U.S. at 651 (describing multiple purposes of New Melones Project, including hydropower purposes). Under section 8 of the 1902 Reclamation Act, state water laws apply to *all* purposes of federal reclamation projects, including hydropower purposes. *United States v. California*, 694 F.2d 1171, 1179-1180

(9th Cir. 1982) (Kennedy, J.) (on remand of *California*, state water laws held to apply to hydropower purposes of New Melones Project). Indeed, the FPA does not even apply to federal projects, see *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269 (10th Cir. 1986), and hence, even apart from the effect of section 8, the FPA does not preempt state laws as applied to federal hydropower uses. Therefore, under FERC's preemption argument, state laws would apply to *federal* power projects but not to *private* power projects. Nothing in the FPA indicates that Congress meant to anomalously exempt private power projects from state requirements that apply to federal power projects. To the contrary, section 27 indicates that both projects must meet the same requirements.

B. State Interest In Allocating Water

Congress, in its deference to state water laws, has also recognized that the states have legitimate interests in allocating their scarce water supply among competing public and private needs. The American West—depicted by nineteenth-century cartographers as the "Great American Desert," *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935)—suffers from conditions of aridity that do not exist elsewhere in the nation. Because of water scarcity, the allocation of water in the West determines the nature and extent of economic growth, and the balance between economic growth and environmental quality. For example, the diversion of water from the Sacramento-San Joaquin Delta for agricultural needs in the Central Valley or domestic needs in Los Angeles, reduces the availability of water for competing economic and environmental needs in the northern part of California. See *United States, et al. v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986). In balancing such competing needs, the state makes important policy judgments concerning its economic and social order. As the California Supreme Court has declared:

> "The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 702 (1933).

In enacting section 27, Congress ensured that the states would retain their traditional water rights authority to balance hydropower needs against competing needs.

The western states have developed a unique body of water law to achieve maximum utilization and conservation of their limited water supply. This body of law, the doctrine of "prior appropriation," provides that water rights exist only to the extent that water is put to "beneficial use" as determined under state law. See, *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441-444 (1983). The appropriation doctrine, unlike the common law riparian doctrine, provides for comprehensive state management and regulation of water rights. Most western states have created state agencies that administer their appropriation systems. In California, the appropriation system is administered by the State Board, which has special expertise in water rights regulation. As the California Supreme Court has noted, the State Board's function has "steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of water." *National Audubon Society*, 33 Cal.3d at 444.

In exercising its water rights authority, the State Board is authorized to issue permits for water uses that, in the Board's judgment, are "reasonable and beneficial" and in the "public interest." Cal. Water Code §§ 174, 1253, 1255, 1257; *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, 26 Cal.3d 183, 195 (1980). In considering these factors, the State Board must consider "all beneficial uses" of water, including, *inter alia*, the need for "preservation and enhancement of fish and wildlife" and any relevant "power" needs. Cal. Water Code § 1257. Thus, in acting on the Rock Creek application here, the State Board is specifically mandated to consider fish needs in relation to power needs. Indeed, the California Constitution provides that water rights exist only to the extent that water is put to "reasonable and beneficial" use under California law, Cal. Const., Art. X, § 2, and the State Board relied on this constitutional provision in establishing flow rates in this case. D 1596, at 8 (J.A. 59). Hence, the

Rock Creek project's obligations under state law derive from the California Constitution itself.

FERC's preemption argument would impair the states' traditional water rights authority by authorizing FERC to exercise *exclusive* jurisdiction over hydropower uses that the states have traditionally regulated and controlled. Under its argument, FERC would function as a super water rights agency, with final authority to determine how much water is available for hydropower development and thus how much water is available for all other uses. Under its argument, FERC could allocate disproportionate quantities of water for hydropower development—in keeping with its primary mission to provide such development—and thereby reduce availability of water for domestic, environmental, agricultural or other uses that the state believes to be vital to the welfare of its citizens. For example, FERC could allocate most or all of the streamflow for immediate downstream hydropower production, thus preventing the state from reserving substantial water for future upstream needs of its growing communities. As in this case, FERC could impose relatively modest flow requirements—relying as here on the project operator's own flow recommendations—and prevent the state from protecting downstream fish resources that belong to all the people of the state. These kinds of policy judgments, in their totality, affect the character of society and the quality of the world that it inhabits. In enacting section 27, Congress ensured that the states would retain their traditional water rights authority to make such policy judgments.

VI. THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL REGULATION IN THIS CASE

As we have explained, section 27 provides that hydropower projects must comply with state water laws irrespective of any rights and obligations under a FERC license, with the caveat that state laws cannot be applied if they conflict with "clear congressional directives." Cf. *California*, 438 U.S. at 672, & n. 25. Therefore, the states have the right to deny water rights permits for—in effect, to veto—projects that fail to comply with state law, assuming that the state action does not conflict with a clear congressional directive. The states have the same veto authority over FERC-licensed hydropower projects that they have over

water projects licensed by the Army Corps of Engineers under the Rivers and Harbors Act of 1899, projects that, as this Court has held, must have the "concurrent and joint assent of both the National Government and the state government." *Cummings v. Chicago*, 188 U.S. 410, 431 (1903); see pages 40-41, & n. 21, *supra*. As we have noted, section 27 was patterned after section 8 of the 1902 Reclamation Act, and this Court has held that, under section 8, "Congress did not intend the Secretary of the Interior to initiate the project" "if state law did not allow the appropriation or condemnation of the necessary water." *California*, 438 U.S. at 669 n. 21. Indeed, FERC's predecessor, the FPC, stated in its 1927 annual report that "it is possible for either agency [the FPC or the state water rights agency] to halt development by interposing its veto." FPC, Seventh Annual Report, at 3 (1927); see note 17, *supra*. Since no "clear congressional directives" preclude California from imposing its flow requirements here, California's flow requirements are applicable under section 27.

Indeed, apart from the fact that California law does not conflict with a congressional directive, California law does not even conflict with the FERC license itself. California, rather than exercising its authority to deny a water right permit for the Rock Creek project, has granted the permit. Thus, the project can lawfully divert water under both the state permit and the federal license, and there is no conflict between the permit and license in that respect. This case is distinguishable from *First Iowa* on this ground because, as the *First Iowa* Court noted, the Iowa statute involved in that case effectively vetoed the project by prohibiting construction of the dam. *First Iowa*, 328 U.S. at 166-167.

Additionally, there is no conflict between the State Board permit and the FERC license with respect to minimum flow requirements, for the State Board has imposed more stringent flow requirements than FERC. Hence, the project, in complying with the State Board's more stringent requirements, will necessarily comply with FERC's less stringent requirements. The FERC requirements are, by their terms, "minimum" requirements and do not preclude the project from meeting higher requirements. License Order, at 8 (J.A. 25). The State Board requirements, rather than frustrating the purpose of the FERC requirements,

provide greater protection of the fish resource that is the subject of the FERC requirements. The project can meet its obligations under both federal and state requirements and is not required to choose between them. Therefore, there is no conflict between state and federal flow requirements in this case. In any event, whether or not California's requirements somehow "conflict" with FERC's lesser requirements, California's requirements are applicable because they do not conflict with a "clear congressional directive."

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the decision below and remand the case for further proceedings consistent with its opinion.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General for the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
CLIFFORD T. LEE
Deputy Attorneys General
Attorneys for Petitioner
State of California